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**What Lies Ahead for Organized Labor in The Private Sector
(Including Private Higher Education)?**

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Whither the National Labor Relations Board?

Go to the NLRB's website and you'll find only two faces and two names:

- Wilma B. Liebman, Chairman, and
- Peter Carey Schaumber, now in his second term.

[http://www.nlr.gov/about_us/overview/board/index.aspx]

The page also lists three vacancies. Why? "The National Labor Relations Board has operated with only two members for more than two years because Democrats refused to confirm President George W. Bush's nominees because of complaints that they were pro-business. Republicans now are blocking President Obama's nominees, complaining that some favor union interests." [Jesse J. Holland, "Supreme Court looks at labor board," Boston Globe, March 24, 2010.] The stalemate has created a potential crisis of major proportions.

On March 23rd, the Supreme Court heard arguments in a case challenging the validity of a two-member NLRB to render binding decisions. A fully-staffed board delegated its powers to the two hold-overs when it became clear that members would be rotating off without any hope of replacements. The two-member “rump” board has rendered nearly 600 decisions to date. “Decisions in hundreds of worker-employer battles could be thrown out if the Supreme Court rules against the NLRB. That decision could also force the shutdown of the board.” [Id.]

Opponents say all the decisions the two board members have made are illegal. “One of the things that we think is clear is that the remedy for fixing an undersized board is not for the board to redefine itself . . . but for Congress or the president to act,” said lawyer Sheldon E. Richie, who represented New Process Steel L.P., which lost an unfair labor practices case in front of the short-staffed NLRB.

But government lawyers said the full board legally voted to give all of its power to the two members, and the decisions made since then are legal. Wilma Liebman, NLRB chairman, a Democrat, and fellow board member Peter Schaumber, a Republican, have issued 586 decisions to date as a two-member board. “I am not here suggesting that the two-member board is ideal or equivalent or optimal,” Deputy Solicitor General Neal Katyal said. “But faced with a vacancy crisis and shutting down the board entirely, I think the board did the prudent thing here by continuing to operate, continuing for these 800 or so days to decide these cases.” [Id.]

When the Supreme Court renders its decision later this year, it will resolve a conflict that has arisen among three U.S. Courts of Appeals in just the few short years that the board has been operating without its full complement. Opinions issued

simultaneously on May 1, 2009, by the Seventh and D.C. Circuits represent the differing interpretations of the National Labor Relations Act on this point:

• **New Process Steel, L.P. v. NLRB**, 564 F.3d 840 (7th Cir., May 1, 2009):

New Process' first objection to the NLRB's orders is that it lacks authority to issue them in the first place. A little background information is needed for this argument. The NLRB, by statute, consists of five members. Those members are appointed by the President with the advice and consent of the Senate and serve staggered five year terms. *29 U.S.C. § 153(a)*. Also by statute, the NLRB is allowed to delegate the authority of the five member body to smaller, three member panels. This delegation process was spelled in § 3(b) of the NLRA:

The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise ... A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof. *29 U.S.C. § 153(b)*.

On December 28, 2007, with one seat already vacant and another member's term about to expire, the four members of the Board delegated all of its authority to a three member panel. When the recess appointment of one member of that group of three expired three days later, the remaining two members proceeded as a quorum. As of January 2009, the NLRB had issued over 300 opinions, both published and unpublished, through this two-member quorum. New Process alleges that this delegation procedure

violates both the plain meaning of § 3(b) of the NLRA and the purpose of that act as embodied in the relevant legislative history because it was in fact a delegation to a two-member panel rather than a three-member panel.

We begin with the plain meaning of the statute. New Process claims that the Board's delegation was improper in the first instance. The third member, whose term was about to expire, was in New Process' view a phantom member who would not actually consider the cases before the Board. New Process claims that this procedure violated the plain meaning of the first sentence of the act because it is not a delegation to "three or more" members of the NLRB, but only to two members. The upshot of New Process' view, as their counsel explained at oral argument, is that the first sentence of § 3(b) restricts the Board from acting when its membership falls below three.

The NLRB argues that the statute at issue is clear that the vacancy of one member of a three member panel does not impede the right of the remaining two members to execute the full delegated powers of the NLRB. As the NLRB delegated its full powers to a group of three Board members, the two remaining Board members can proceed as a quorum despite the subsequent vacancy. This indeed is the plain meaning of the text. As we read it, § 3(b) accomplished two things: first, it gave the Board the power to delegate its authority to a group of three members, and second, it allowed the Board to continue to conduct business with a quorum of three members but expressly provides that two members of the Board constitutes a quorum where the Board has delegated its' *846 authority to a group of three members. The plain meaning of the statute thus supports the NLRB's delegation procedure.

• **Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB**, 564 F.3d 469 (D.C. Cir., May 1, 2009):

Indeed, if Congress intended a two-member Board to be able to act as if it had a quorum, the existing statutory language would be an unlikely way to express that intention. The quorum provision clearly requires that a quorum of the Board is, “at all times,” three members. *29 U.S.C. § 153(b)*. A modifying phrase as unambiguous as this denotes that there is no instance in which this Board quorum requirement may be disregarded. Contrary to the Board’s contentions, Congress did not intend to use the delegatee group quorum provision as an exception to the requirement that the Board quorum requirement must be met “at all times.” Though the delegatee group quorum provision is preceded by the prepositional phrase “except that,” *id.*, Congress’s use of differing object nouns within the two quorum provisions indicates clearly that each quorum provision is independent from the other. The establishment of a two-member quorum of a subordinate group does not logically require any change in the provision mandating a three-member quorum for the Board as a whole. In fact, it does not seem odd at all that a sub-unit of any body would have a smaller quorum number than the quorum of the body as a whole. Quorums, after all, are usually majorities. A majority of three is smaller than a majority of five. It therefore defies logic as well as the text of the statute to argue, as the Board does, that a Congress which explicitly imposed a requirement for a three-member quorum “at all times” would in the same sentence allow the Board to reduce its operative quorum to two without further congressional authorization. Congress provided unequivocally that a quorum of the Board is three members, and that this

requirement must be met at all times. The delegee group quorum provision does not eliminate this requirement.

New Board members take office. In early April, Board Members Craig Becker and Mark Gaston Pearce took office and began a series of orientation programs about the Board, its organizational procedures and case inventory. Becker was sworn into office on April 5th by General Counsel Ronald Meisburg. Pearce was sworn in three days later by Chairman Wilma Liebman.

The seating of Becker and Pearce brings the Board to four members with one remaining vacancy. While this breaking of the deadlock is good news for some parties with pending cases, it doesn't resolve the fate of the 595 cases decided by the rump Board. Their fate remains in the hands of the nation's highest Court, which currently is the only branch of the federal government controlled by conservatives.

Supreme Court Knocks Down Barriers to Corporate, Labor Spending in Political Campaigns.

As labor and business eagerly await the high court's ruling on whether the approximately 600 decisions rendered by just two NLRB members are valid or not [see 5.2, above], both sides of the table also are evaluating the reconfigured battlefield resulting from the Supremes' ruling that the First Amendment allows for unlimited spending in election contests. [*Citizens United v. Federal Election Commission*, 130 S.Ct. 876 (January 21, 2010).]

Facts. Citizens United is a nonprofit corporation. It initiated its action in the United States District Court for the District of Columbia. A three-judge court later convened to hear the case. The resulting judgment gave rise to a rare direct appeal to the Supreme Court.

According to the Court, Citizens United has an annual budget of about \$12 million. Most of its funds are from donations by individuals, but, in addition, it accepts a “small portion” of its funds from for-profit corporations. In January 2008, Citizens United released a film entitled *Hillary: The Movie*. It’s a 90-minute documentary about then-Senator Hillary Clinton, who was a candidate in the Democratic Party’s 2008 Presidential primary elections. *Hillary* mentioned Senator (now Secretary of State) Clinton by name and depicted interviews with political commentators and other persons, most of them quite critical of Clinton. *Hillary* was released in theaters and on DVD, but Citizens United wanted to increase distribution by making it available through video-on-demand.

Video-on-demand allows digital cable subscribers to select programming from various menus, including movies, television shows, sports, news, and music. The viewer can watch the program at any time and can elect to rewind or pause the program. In December 2007, a cable company offered, for a payment of \$1.2 million, to make *Hillary* available on a video-on-demand channel called “Elections ’08.” Some video-on-demand services require viewers to pay a small fee to view a selected program, but here the proposal was to make *Hillary* available to viewers free of charge.

To implement the proposal, Citizens United was prepared to pay for the video-on-demand. To promote the film, it produced two 10-second ads and one 30-second ad for

Hillary. Each ad included a short statement about Clinton, followed by the name of the movie and the movie's Website address. Citizens United desired to promote the video-on-demand offering by running advertisements on broadcast and cable television.

Citizens United sought a declaratory judgment. Before the Bipartisan Campaign Reform Act of 2002 (BCRA), federal law already prohibited corporations and unions from using general treasury funds to make direct contributions to candidates and independent expenditures that expressly advocate the election or defeat of a candidate, through any form of media, in connection with certain "qualified" federal elections. [2 U.S.C. § 441b (2000 ed.); see *McConnell v. Federal Election Comm'n*, 540 U.S. 93 (2003).] The BCRA § 203 amended § 441b to prohibit any "electioneering communication" as well. [2 U.S.C. § 441b(b)(2) (2006 ed.).] An electioneering communication is defined by the act as "any broadcast, cable, or satellite communication" that "refers to a clearly identified candidate for Federal office" and is made within 30 days of a primary or 60 days of a general election. [§ 434(f)(3)(A).]

The Federal Election Commission's (FEC) regulations further defined an electioneering communication as a communication that is "publicly distributed." [11 CFR § 100.29(a)(2) (2009).] "In the case of a candidate for nomination for President ... publicly distributed means" that the communication "[c]an be received by 50,000 or more persons in a State where a primary election ... is being held within 30 days." [§ 100.29(b)(3)(ii).]

Corporations and unions were barred from using their general treasury funds for express advocacy or electioneering communications. They might establish, however, a "separate segregated fund" (known as a political action committee, or PAC) for these

purposes. [2 U.S.C. § 441b(b)(2).] The money received by the segregated fund were limited to donations from stockholders and employees of the corporation or, in the case of unions, members of the union.

As noted above, Citizens United wanted to make *Hillary* available through video-on-demand within 30 days of the 2008 primary elections. It feared, however, that both the film and the ads would be covered by § 441b's ban on corporate-funded independent expenditures, thus subjecting it to civil and criminal penalties under § 437g. In December 2007, Citizens United sought declaratory and injunctive relief against the FEC. It argued that (1) § 441b was unconstitutional as applied to *Hillary*; and (2) the BCRA's disclaimer and disclosure requirements [BCRA §§ 201 and 311] were unconstitutional as applied to *Hillary* and to the three ads for the movie.

The District Court denied Citizens United's motion for a preliminary injunction [530 F.Supp.2d 274 (D.D.C.2008) (per curiam)], and then granted the FEC's motion for summary judgment. The court held that § 441b was facially constitutional under McConnell, and that § 441b was constitutional as applied to *Hillary* because it was "susceptible of no other interpretation than to inform the electorate that Senator Clinton is unfit for office, that the United States would be a dangerous place in a President Hillary Clinton world, and that viewers should vote against her." The court also rejected Citizens United's challenge to the BCRA's disclaimer and disclosure requirements. It noted that "the Supreme Court has written approvingly of disclosure provisions triggered by political speech even though the speech itself was constitutionally protected under the First Amendment."

The conservative majority reverses. Led by Justice Anthony Kennedy, the 5-Justice conservative majority currently holding sway in the Supreme Court reversed the district judges' decision. The bare majority held, "Federal statute barring corporations from using general treasury funds to make independent expenditures that expressly advocate the election or defeat of a candidate, through any form of media, in connection with certain qualified federal elections, and, as amended by Bipartisan Campaign Reform Act of 2002 (BCRA), barring corporations from using general treasury funds to make independent expenditures for electioneering communications within 30 days of a primary election or 60 days of general election for federal office, violated First Amendment political speech rights of nonprofit corporation that wished to distribute on cable television, through video-on-demand, a film regarding a candidate seeking nomination as a political party's candidate in the next Presidential election." In so holding, the majority expressly overruled *McConnell*, though the decision was only seven years old.

Bitter dissent. That the Chief Justice and several of the other Justices in the majority penned concurring opinions suggests how controversial the Court's majority decision is. Additionally, the Court's four moderate-to-liberal members issued a dissent that is nearly equal in length to the majority and concurring opinions taken together. Authored by Justice Stevens, the dissent begins, "The real issue in this case concerns how, not if, the appellant may finance its electioneering. Citizens United is a wealthy nonprofit corporation that runs a political action committee (PAC) with millions of dollars in assets. Under the Bipartisan Campaign Reform Act of 2002 (BCRA), it could have used those assets to televise and promote *Hillary: The Movie* wherever and whenever it wanted to. It also could have spent unrestricted sums to broadcast *Hillary* at

any time other than the 30 days before the last primary election. Neither Citizens United's nor any other corporation's speech has been "banned," ante, at 886. All that the parties dispute is whether Citizens United had a right to use the funds in its general treasury to pay for broadcasts during the 30-day period. The notion that the First Amendment dictates an affirmative answer to that question is, in my judgment, profoundly misguided. Even more misguided is the notion that the Court must rewrite the law relating to campaign expenditures by for-profit corporations and unions to decide this case."

Justice Stevens and his colleagues contend, "The basic premise underlying the Court's ruling is its iteration, and constant reiteration, of the proposition that the First Amendment bars regulatory distinctions based on a speaker's identity, including its "identity" as a corporation. While that glittering generality has rhetorical appeal, it is not a correct statement of the law. Nor does it tell us when a corporation may engage in electioneering that some of its shareholders oppose. It does not even resolve the specific question whether Citizens United may be required to finance some of its messages with the money in its PAC. The conceit that corporations must be treated identically to natural persons in the political sphere is not only inaccurate but also inadequate to justify the Court's disposition of this case.

"In the context of election to public office, the distinction between corporate and human speakers is significant. Although they make enormous contributions to our society, corporations are not actually members of it. They cannot vote or run for office. Because they may be managed and controlled by nonresidents, their interests may conflict in fundamental respects with the interests of eligible voters. The financial

resources, legal structure, and instrumental orientation of corporations raise legitimate concerns about their role in the electoral process. Our lawmakers have a compelling constitutional basis, if not also a democratic duty, to take measures designed to guard against the potentially deleterious effects of corporate spending in local and national races.”

Organized labor’s reaction. Since the Court’s decision frees up labor unions, as well as for- and not-for-profit corporations to wade into the potential spending spree, one might expect organized labor to applaud the conservative majority’s decision. If AFL-CIO President Richard Trumka’s reaction is typical, then quite the contrary is true. In a statement issued on the day the decision was announced, Trumka complained:

Today, the Supreme Court further tilted the playing field in favor of business corporations in public elections. By allowing unlimited corporate treasury expenditures that explicitly support or oppose particular candidates, the Court has increased the already excessive influence that corporations exert in our electoral system. And we believe the Court wrongly treated corporate expenditures the same as union expenditures, contrary to the arguments we made in our brief in this case. Unions, unlike businesses, are democratically-controlled, nonprofit membership organizations representing working men and women across the country, and their independent speech should accordingly be given greater protection.

The AFL-CIO supports a system of campaign finance regulation that promotes democratic participation in elections by individuals and their

associations; protects legitimate independent speech rights; offers public financing to candidates while firmly regulating contributions to them; and guarantees effective disclosure of who is paying for what.

[<http://www.aflcio.org/mediacenter/prsptm/pr01212010a.cfm>]

Authors' comments.

Labor relations in the private sector of the U.S. economy are in a state of turmoil. As pointed out in section 5.2, above, the Supreme Court may very well rule later this year that some 600 decisions, rendered by a two-member “rump” regime of the National Labor Relations Board, are invalid and must be vacated. Given the willingness of the five conservatives on the high court — Roberts, Alito, Kennedy, Scalia and Thomas — to toss out a precedent dating back only to 2003 in order to allow unlimited corporate spending on electioneering, we shouldn’t expect concern for judicial stability to prevent their invalidation of 600 labor board decisions, as well.

Although the stalemate in Congress over the approval of new Board members broke in April with the appointment of two new Members (see 5.2, above), the only real solution may be significant reform of the federal labor law scheme. Successive administrations and Congresses have avoided biting this bullet since the National Labor Relations Act was last amended in a significant way, more than half a century ago. The reason for this inaction seems to be that Democrats and Republicans, and labor and management, fear what might emerge if the entire statutory structure were opened for debate.

However, the Obama administration — finally having a healthcare act on its trophy wall— just might be willing to move labor law to one of its front burners during the window of opportunity that will most likely close in November 2010, when the Democrats could lose control of the House of Representatives. Whether Obama and company see labor as an urgent issue and whether they have the stomach for yet another big battle are questions that remain to be answered during the next six months.